MAJLIS PERBANDARAN PULAU PINANG

v.

TROPILAND SDN BHD

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-636-2000]
14 JULY 2003

CIVIL PROCEDURE: *Action - Limitation period - Part payment of debt - When time began to run - Limitation Act 1953 s. 26*

CIVIL PROCEDURE: *Execution - Order for sale of immovable property by public auction - Whether proceedings a nullity - Whether plaintiff adopted wrong procedure*

LAND LAW: *Charge - Attachment of land - Whether 'charge' needed to be registered - Meaning of "charge" - Whether needed to serve Form 16D - National Land Code ss. 254, 268 - Local Government Act 1976 ss. 146, 151 - Rules of the High Court 1980 O. 83*

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Whether could recover arrears of rates by attachment and sale of property - Whether compulsory to issue half-yearly bills - Local Government Act 1976 s. 151*

WORDS & PHRASES: *"Charge" - Section 146 Local Government Act 1976 - Meaning of*

The defendant failed to pay to the plaintiff the arrears of rates in respect of the property owned by the defendant for the period from 10 April 1993 to 31 December 1999. Thereupon, the plaintiff commenced a proceeding under s. 151 Local Government Act 1976 for the attachment and sale of the property in order to recover the arrears of rates together with interests and costs. The Senior Assistant Registrar ('SAR') granted the order for attachment and sale of the property. The defendant appealed against the order on the grounds that: (i) the whole proceeding was a nullity because the plaintiff adopted the wrong procedure; (ii) there was no liability on the defendant to pay the amount claimed as it did not receive the half-yearly bills for assessment for the period between 1993 and 1999; and (iii) the claim was time barred.

Held (dismissing the appeal):

[1] Neither the Local Government Act ('LGA') nor the National Land Code ('NLC') requires the plaintiff to register a charge over the defendant's property and thereafter to issue a Form 16D notice to the defendant before instituting proceedings for the attachment and sale of the defendant's property pursuant to s. 146 LGA or O. 83 Rules of the High Court 1980. (p 333 e)

[2] The word "charge" in s. 146 LGA does not mean the same as the word "charge" in s. 254 NLC. (p 334 c)

[3] The word "charge" in s. 146 LGA is a statutory charge or a statutory liability or burden imposed upon holdings, for rates due and owing to the local authority under LGA upon the failure of the owner of the holdings to pay the rates. The local authority is entitled in the last recourse to seek an order from the registrar of the High Court for the attachment and sale of the holdings in order to recover any unpaid rates or arrears of rates. (pp 341 i & 342 a)

[4] It is the intention of Parliament, by using the phrase "first charge over the holdings" in s. 146 LGA, to confer upon the local authority priority over all debts owing upon a sale of the holdings. This priority is over and above that which is provided for in s 268 NLC. (p 342 c-d)

[5] There was no agreement or contract between the plaintiff and the defendant to pay the arrears of rates. The liability to pay the arrears of rates is a statutory liability and therefore it is not incumbent on the plaintiff to issue and serve a Form 16D notice on the defendant before applying to the court for the attachment and sale of the property. (p 343 c-d)

[6] As there is no provision in the LGA making it obligatory for the plaintiff to issue, subsequent to the first notice of assessment, bills every half-yearly, once a holding has been assessed for the very first time and due notice of assessment has been given to the owner of the holding, then, irrespective of whether or not the owner has received the half-yearly bills, the owner is under statutory duty to pay the arrears of rates. (p 345 e-f)

[7] Time only began to run from 29 February 2000, ie, the date on which the defendant made part payment to the plaintiff. Therefore the plaintiff's claim was not barred by limitation pursuant to s. 26 of the Limitation Act 1953. (p 350 g)

Case(s) referred to:

Ang Choon Koay v. Chairman, Sanitary Board. Kuala Lumpur [1934] MLJ 274; [1933 - 34] FM SLR 29 ***(foll)***
Birmingham Corporation v. Baker [1881] 17 Ch D 782 ***(refd)***
Re Bowerman, Porter v. Bowerman [1908] 2 Ch 340 ***(refd)***
Hussain v. Chanda Singh [1935] MLJ 1262 ***(refd)***
Paddington Borough Council v. Finucane [1928] 1 Ch 567 ***(refd)***
Phileoallied Bank (Malaysia) Berhad v Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
Public Bank Bhd v. Noor Ehsannuddin Mohd Harun [2000] 8 CLJ 505 HC ***(refd)***
Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 ***(refd)***
Swiss Bank Corporation v. Lloyds Bank Ltd [1982] AC 584 ***(refd)***
Tropiland Sdn Bhd v. Majlis Perbandaran Pulau Pinang [1998] 4 CLJ 299 CA ***(foll)***
Westminster City Council v. Haymarket Publishing [1981] 1 WLR 677 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 26
Local Government Act 1976, ss. 2, 108(2)(c), 127, 133, 141(1), (3), 146, 147, 148, 149, 150, 151(1), 152, 153, 154, 155, 157, 158, part XV
National Land Code, ss. 5, 242, 243. 254, 268(1), (3), 399(3), Forms 16A, 16B, 16D
Rules of the High Court 1980, O. 47, O. 83 r. 1(1)(a), (b), (c), (d)
Sanitary Board Enactment 1929, s. 45

General Rate Act [UK], ss. 17a(1), 17B
Housing Act 1925 [UK], s. 3(3)
Land Code 1926 [UK], s. 129, part X

For the plaintiff - Dato' Lakhbir Singh Chahl (M Thayalan); M/s Lakhbir Singh Chahl, Yagoo & Assocs
For the defendant - Karin Lim; M/s Presgrave & Matthews

Reported by Izzaty Izzuddin

JUDGMENT

Su Geok Yiam JC:

This is an appeal to the judge in chambers (encl. 31) by the defendant against the decision of the learned Senior Assistant Registrar dated 18 January 2002 allowing the plaintiff's application *vide* an originating summons filed on 10 April 2000 (encl. (2)) and ordering that the immovable property of the defendant be sold by public auction for nonpayment of arrears of rates due and owing to the plaintiff together with interest and costs.

Facts

The facts are, briefly, as follows:

The defendant is the registered proprietor of premises known as No. 1, Lebuh Tek Soon, 10000 Penang ("the property"). The defendant operates a multistoreyed car park known as the Komtar car park on the property.

The plaintiff is the local authority of the area where the property is situated.

The defendant failed to pay to the plaintiff the arrears of rates in respect of the property for the period from 10 April 1993 to 31 December 1999 ("the said period") amounting to RM835,264.07 ("the arrears of rates"). The plaintiff successfully instituted proceedings against the defendant pursuant to s. 151 of the Local Government Act 1976 ("the LGA") for the attachment and sale of the property in order to recover the arrears of rates together with interest thereon and costs.

Senior Assistant Registrar's Order For Attachment And Sale

On 18 January 2002 the learned Senior Assistant Registrar ("SAR") ordered that the property be attached and sold in order to pay the arrears of rates together with interest thereon at 6% per annum from 29 March 2000 which is the date of the service of the Form H notice until realisation and costs. The SAR also ordered that the property be sold by public auction on 17 April 2002, that the reserve price and other directions as regards the sale are to be fixed by the SAR of the High Court, Penang, that the defendant deliver vacant possession of the property within seven days of the date of sale, that costs as against the defendant be assessed and that the relevant authorities register the name of the purchaser ("the said order").

Grounds Of Appeal

In this appeal the defendant is seeking to set aside the said order on the following grounds:

First, the defendant says that the whole proceedings are a nullity because the plaintiff has adopted the wrong procedure. According to the defendant the correct procedure is for the plaintiff to register a charge over the property in respect of the arrears of rates and thereafter to issue to the defendant a Form 16D notice pursuant to s. 254 of the National Land Code 1965 ("the NLC"). It is only upon the failure of the defendant to comply with the Form 16D notice that the plaintiff can apply for an order for the sale of the property by public auction pursuant to O. 83 of the Rules of the High Court 1980 ("the RHC").

Secondly, the defendant says that there is no liability on the defendant to pay the amount claimed by the plaintiff as there are no arrears of rates due and owing by the defendant to the plaintiff because no half-yearly assessment bills requiring the defendant to pay rates for the duration of the said period were ever sent by the plaintiff to the defendant and the plaintiff cannot aggregate in one lump sum the arrears of rates for the said period.

Thirdly, the defendant says that the plaintiff's claim must fail because it is time barred. On 7 April 2003 having heard lengthy submissions from both the learned counsels for the parties stretching over several days and having considered the written submissions and further written submissions of Miss Karin Lim, learned counsel for the plaintiff, the authorities cited by Mr. Thayalan and Dato' Lakhbir Singh, learned counsels for the defendant and Miss Karin Lim, and the affidavits I dismissed the defendant's appeal with costs.

I now give my reasons for so doing.

First issue: Whether the correct procedure is for the plaintiff to register a charge over the property and thereafter to issue a Form 16D notice to the defendant before the plaintiff can proceed under O. 83 of the RHC

In my judgment neither the LGA nor the NLC requires the plaintiff to register a charge over the defendant's property and thereafter to issue a Form 16D notice to the defendant before instituting proceedings for the attachment and sale of the defendant's property pursuant to s. 146 of the LGA and O. 83 of the RHC.

The defendant does not dispute that by virtue of s. 146 of the LGA the plaintiff has a first charge over the defendant's property since the section is very clear on this. What the defendant contends, however, is that the first charge means a registered first charge.

The plaintiff on the other hand, contends that the first charge means an equitable charge which requires no registration and neither is it registrable pursuant to the NLC as the NLC does not prohibit creation of equitable charges. (See *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266). The plaintiff also submits that an equitable charge is not an equitable mortgage and that an equitable charge is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realization by judicial process, that is to say, by the appointment of a receiver or an order for sale as defined. (See *Swiss Bank Corporation v. Lloyds Bank Ltd* [1982] AC 584, HL).

In response, the defendant disputes the plaintiff's contention that the charge mentioned in s 146 of the LGA is an equitable charge because if it were so then on the authority of the decision of the Federal Court in *Phileoallied Bank (Malaysia) Berhad v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621, O. 83 of the RHC would not apply and O. 47 of the RHC would apply.

The question which arises is what is the meaning of the word " charge" in s. 146 of the LGA? This is because unlike s. 5 of the NLC which defines a "charge" to mean a "registered charge", there is no such definition of the word "charge" in the LGA.

In my view the word "charge" which is to be found in s. 146 of the LGA does not mean the same as the word "charge" in s. 254 of the NLC.

I shall reproduce below the two provisions in my attempt to explain why in my view it was the intention of Parliament when enacting the two provisions that the same word "charge" which is found in the two provisions in the two different statutes ought to be interpreted and construed differently because the same word is used in two different contexts.

Section 146 of the LGA provides as follows:

> 146. **All rates shall be paid by** the persons who are **the owners of the holdings** for the time being, **and until so paid shall** subject to the provisions of the National Land Code, **be a first charge on the holdings** in respect of which they are assessed, **and if not paid within the prescribed time, shall be recoverable in the manner hereinafter prescribed**. (Emphasis added)

The words "owner" and "holding" have been defined in s. 2 of the LGA as follows:

> owner:
>
> a) in relation to any land or building, means the registered proprietor of the land and, if in the opinion of the local authority the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who receive the same if such premises were let to a tenant; and
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> b) in the case of subdivided buildings, includes the management corporation and any subsidiary proprietor.
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> "holding" means any land, with or without buildings thereon, which is held under a separate document of title and in the case of subdivided buildings, the common

property and any parcel thereof and, in the case of Penang and Malacca, "holding" includes messuages, buildings, easements and hereditaments of any tenure, whether open or enclosed, whether built on or not, whether public or private, and whether maintained or not under statutory authority.

Section 254 of the NLC provides as follows:

254. Service of default notice, and effect thereof

(1) *Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as maybe specified in the charge, the chargee may serve on the chargor a notice in Form 16D*:

a) specifying the breach in question;

b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the **charge**; and

c) warning the chargor that, if the notice is not complied with he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:

a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the **chargee**; and

b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter.

Provided that paragraph (a) shall not apply to any **charge** to secure the payment of an annuity or other periodic sum. (Emphasis added)

My reasons are as follows:

First, s. 242 of the NLC expressly provides that every charge to secure the repayment of a debt or the payment of any sum other than a debt shall be effected by an instrument in Form 16A and every charge to secure the payment of an annuity or other periodic sum shall be effected by an instrument in Form 16B. Section 243 of the NLC also provides that every charge created under

the NLC shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions of the NLC.

Secondly, my own research has disclosed the following:

> The word "charge" is given, *inter alia*, the following meaning in the New Shorter Oxford English Dictionary:
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> ... a liability to pay money laid on a person or estate

When applied to the instant case together with the definition of the word "holding" in the LGA the phrase "charge on the holdings" would mean "a liability to pay money laid on the holdings".

In *Stroud's Judicial Dictionary*, 5th edn, vol. 1, the word "charge" is given, *inter alia*, the following meanings at pp. 395 to 396:

> (6) "Charge on premises" (s. 257, Public Health Act 1875 (c.55)): see *Sunderland v. Alcock*, 51 LJ Ch 546; PREMISES; OWNER. This was "a present existing charge as from the time of the completion of the works" (per Lindley LJ, *Hornsey v. Monarch Building Society*, 24 Q.B.D. 1: citing *Tottenham v. Rowell*, 15 Ch. D. 378, and *Re Bettesworth and Richer*, 37 Ch. D. 535; *Re Allen &, Driscoll* [1904] 2 Ch. 226, cited OUTGOING); a rule which applied to a similar "charge" under s.13, Private Street Works Act 1892 (c.57) (*Stock v. Meakin* [1899] 2 Ch. 496; [1900] 1 Ch. 683; *Surtees v. Woodhouse* [1903] 1 K.B. 396, cited OUTGOING]. *This was not a "land charge" requiring registration under Land Charges Registration and Searches Act 1888 (c.51) - see Land Charges Act 1952 (c.22), Part IV (R v. Holt, 24 Q.B.D. 178, but it was an incumbrance on settled land (Re Leah [1902] 2 Ch 274, and Re Smith [1901] 1 Ch. 689, cited INCUMBRANCE*), and so was a charge under the Private Streets Works Act 1892 (c. 57) (Re Pizzi [1907] 1 Ch. 67).
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> (19) "Charge on the land" (General Rate Act 1967 (c.9), s.17B(3)). By this section a rating surcharge is a "charge on the land" and imports a charge on all interests in the land when the charge arises. It was held therefore to bind the interest of a bank to which the premises had been charged by way of legal mortgage (*Westminster City Council v. Haymarket Publishing* [1981] 1 W.L.R. 677). (Emphasis added)

Similarly here, the charge on the holdings in s. 146 of the LGA does not require registration under the NLC. Nevertheless, it is an incumbrance on the holdings. Furthermore, it binds the interests of a registered chargee of the holdings.

In *Words and Phrases Legally Defined*, 2nd edn, vol. 1, the word "charge" is given, *inter alia*, the following meanings at p. 238:

> Charge (Liability).
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> There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding upon the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon a person, *viz* upon the plaintiff as owner of the premises ... . These [paving] expenses paid by the plaintiff were incurred in respect of the demised premises .. . The fact of the plaintiff paying them because he was compellable by law to do so, does not make them any the less a charge on the premises within the meaning of the covenant ... ., The plaintiff is also entitled to recover because these expenses were a charge upon 'a person in respect of the premises,' ie, they were a debt payable by the plaintiff in respect thereof." *Hartley v. Hudson* [1879], 4 C.P.D. 367, per Lindley, J., at pp. 367-369.
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> **The word 'charge' may well be used to describe a burden imposed upon land, and if a payment has to be made in respect of land, and it can only be enjoyed subject to the liability for that payment**, I cannot think that there would be any great straining of language if it were spoken of as charged upon the land." *Payne v. Esdaile* [1888], 13 App. Cas. 613, per Lord Herschell, L.C., at pp. 623, 624. (Emphasis added)

Similarly here, the rates are a burden imposed on the property by the LGA and the rates bind the defendant who is the owner of the property and also bind the property such that the defendant can only enjoy his property subject to the payment of the rates.

In regard to "equitable charge", Joyce J, said as follows in *Re Bowerman, Porter v. Bowerman* [1908] 2 Ch 340, at pp. 342 - 344:

> Every valid equitable charge is now also legal in the sense that it is recognised and enforceable at law as well as in equity; and a legal mortgage is, as always, enforceable in equity, and in that sense an equitable charge ... . *The only way ... in which the charge now under consideration [a statutory charge for estate duty] differs from any other equitable charge is that it is created by statute, not by contract between parties. It is none the less an 'equitable charge'* (Emphasis added)

Similarly here, the "charge on holdings" in s. 146 of the LGA is a valid equitable charge being a statutory charge for rates imposed on the property under the LGA. The sole reason why it differs from any other equitable charge is because this "charge on the holdings" is created by an Act of Parliament, namely, the LGA, instead of by contract between the parties.

(See also *Words & Phrases Legally Defined*, 2nd edn, vol. 2, at pp. 173 and 174.

In *Paddington Borough Council v. Finucane* [1928] 1 Ch 567, Russell J, held that the charge created by s. 3 of the Housing Act 1925 for expenses incurred by a local authority for work done to premises to make them reasonably fit for human habitation and for the payment whereof the owner of the premises is liable, is not a charge on the interests of the rack-rent owner only, but is a charge upon the entirety of the interest in the premises.

Section 3(3) of the Housing Act 1925 provided as follows:

> Any expenses incurred by the local authority under this section, together with interest ... maybe recovered in a court of summary jurisdiction and until recovery of such expenses and interest the same shall be a charge on the premises.

Russel J said as follows at p. 572:

> The first point I have to determine is, what is the effect of s. 3 of the Act of 1925 as regards the charge which it thereby purports to give? Is it a charge upon all the propriety interests in the house in question, or is it, as has been contended on behalf of the Ecclesiastical Commissioners and the Paddington Estate Trustees, only a charge upon the interest of the rack-rent owner? There has been no decision upon this actual section, but there have been decisions upon very similar provisions in the Public Health Act, 1875, and I have no doubt that the charge which the section purports to give is a charge of such a nature as that it overrides all other proprietary interests which exist in the house.

and as follows at p. 575:

> Accordingly, as regards the first point raised before me, **I declare that the plaintiffs are entitled under s. 3 of the Housing Act, 1925, to a charge upon the premises** No. 29 Clarendon Street, Paddington, for the sum of 2511 and legal expenses, together with interest at 5 per cent., from November 10, 1921, **and that such charge is entitled to priority over any other interest in the premises. I will follow that up by making an order for the sale of the premises**. (Emphasis added)

In *Westminster City Council v. Haymarket Publishing Ltd, (supra)*, a company acquired certain commercial premises on 3 January 1974 which it charged by way of legal mortgage in favour of a bank, to secure all moneys and indebtedness present and future owing by the company to the bank. The premises remained empty and unused for a period extending beyond 24 October 1975, and a rating surcharge amounting to pound sterling 16,940.93 became payable under s. 17A(1) of the General Rate Act 1967. By s. 17B of the Act

a surcharge was to be a "charge on the land comprised in the hereditament" until recovered. On 19 March 1976, the bank served a demand for payment of the amount due under the bank's legal charge. In April 1976 the rating authority demanded payment of the surcharge and registered it in the land charges registry as a local charge. In August 1977 the bank, in exercise of its powers as legal mortgagee, sold the premises to the defendants. In the contract of sale the bank agreed to indemnify the defendants against the rating surcharge, if that charge was binding on them. Dillon J held that the charge was a charge on the bank's interest as mortgagee and took priority over all interest in the land.

On appeal by the defendant the Court of Appeal applied *Birmingham Corporation v. Baker* [1881] 17 Ch D 782 and *Paddington Borough Council v. Finucane (supra)* and dismissed the appeal. The Court of Appeal held that on its true construction a "charge on the land" in section 17B meant a charge on all the estates and interests in the land, and, accordingly, the charge took priority over the mortgage debt owing to the bank and was binding on the defendants. Lord Denning MR said as follows at pp. 680 and 681:

> Then under section 17 we get the provision that the surcharge is " a charge on the land." What does that mean? I agree that it is ambiguous. The meaning is difficult to discover from the words of the statute. But fortunately there has been a series of cases in the courts which lead inevitably to the interpretation that it means a charge on "all the estates and interests in the land." I will go through the series of cases which lead to this result. The first is *Birmingham Corporation v. Baker* [1881] 17 Ch D. 782. In that case there was a charge on the "premises." Sir George Jessel M.R. said, at p. 786:
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> > Now, the houses per se being inanimate, they cannot bear the burden. If there be a charge on the houses it is a charge on the total ownership - if I may call it so, on the proprietorship; not on any particular section or portion of the proprietorship, but on the whole.
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> The next case is the *Guardians of Tendring Union v. Dowton* [1891] 3 Ch. 265. That again was a question of charge on the "premises". I would pick out the words of Fry L. J., at p. 269: **"All the Act does is to create a charge on the premises - that is, on the land - that is, on all the interests of the owners of the land**."
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> To finish the citations, I would refer to *Paddington Borough Council v. Finucane* [1928] Ch. 567. That was a decision of Russell J., who said of the Public Health Act 1875, at p. 575:
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> > *... when it confers a charge on premises, [it] means not a charge only on the interests of the rack-rent owner in the premises, but a charge upon the entirety of the interests of the premises, the whole of the proprietary interests of the premises.*

Having regard to that line of authorities, it seems to me that we should interpret the words in this statue, "a charge on the land comprised in the hereditament," in the same sense.

It was suggested that it should be confined to cases where the charge was in respect of improvements or expenses incurred upon the land - as happened in some of those cases - and that it should not apply to a charge in respect of penal provision such as this. That distinction is not well-founded. The issue depends simply on the interpretation of the words in the statute. **It seems to me that "a charge on the land" means a charge on "all the estates and interests in the land."**

This conforms with the intention of Parliament. Any other view would mean that it would be open to companies, by manipulation of their affairs between holding and subsidiary companies, to avoid the charge altogether. The land could be bought in the name of a subsidiary company with money obtained on mortgage from a holding company: and, lo and behold, the charge would be gone. That cannot be right. **The judge was quite right in holding that there was a charge on the land in favour of Westminster City Council, and that it took priority over the mortgage debt which was owing to the bank**.

I would dismiss the appeal accordingly. (Emphasis added)

In *Ang Choon Koay v. Chairman, Sanitary Board. Kuala Lumpur* [1934] MLJ 274; [1933 - 34] FM SLR 299, Thomas CJ sitting as a judge of the High Court, Federated Malay States had occasion to consider s. 45 of the Sanitary Board Enactment, 1929 which is similar to s. 146 of the LGA and the section also has the words "first charge".

The section provides as follows:

> Subject to the provisions of the Land Code, 1926, the rate shall be a **first charge** on the holding in respect of which it is assessed, and if not paid within the prescribed time shall be recoverable in the manner hereinafter provided. (Emphasis added)

In that case the facts are also similar to the facts in the instant appeal in that assessments were made under the Enactment in respect of certain lands within the limits of the Sanitary Board of Kuala Lumpur and there were arrears of rates in respect of the assessments amounting to RM4,674. The arrears not having been paid, an application was made under s. 50 of the Enactment to the Registrar of the Supreme Court, Kuala Lumpur to order the attachment and sale of the holding in respect of which the arrears had accrued.

The Registrar ordered the lands to be sold free from a voluntary charge effected under the provisions of Part X of the Land Code. The chargor appealed. In concluding that it was the intention of the Legislature that a rate should be protected by a first charge on the land itself and that in the last recourse it should be recovered by a sale of the land; and that the words "subject to the provisions of the Land Code" do not make that first charge subject to any other charges created under part X of the Land Code and in dismissing the appeal the learned judge made a clear distinction between a rate which he calls a statutory or compulsory charge under s. 45 of the Enactment and a charge under s. 129 of the Land Code which he calls a voluntary charge. The learned judge also said as follows at p. 275, right hand column:

> **The statutory charge is imposed on the holding itself ... the rate is a statutory first charge under section 45.** (Emphasis added)

and as follows at p. 276, left hand column:

> ... the provisions of part X ... do not affect a sale which ... is ordered to take place under the statutory provisions relating to a **statutory prior charge**. (Emphasis added)

Thirdly, s. 146 of the LGA allows the plaintiff to enforce its first charge on the property in accordance with the procedure as outlined in Part XV of the LGA by virtue of the words "all rates ... until so paid shall ... be a first charge on the holdings ... and if not paid within the prescribed time, shall be recoverable **in the manner hereinafter prescribed**". The procedure is set out in detail in ss. 147 to 158 of the LGA.

Section 151(1) of the LGA specifically states that "if the arrears cannot be recovered in the manner provided in s. 148 (ie, attachment and sale of the movable property) it shall be lawful for the learned registrar of the High Court upon application made by the local authority, or by any officer of the local authority authorized by the local authority in that behalf, to order the attachment and sale of the holding or holdings in respect of which the arrears have accrued.

Section 151(2) of the LGA goes further to state that such attachment and sale may be effected in the manner provided by the law relating to civil procedure for execution of a decree by attachment and sale of immovable property. The law relating to civil procedure is contained in the RHC. In my judgment the correct civil procedure to be adopted is contained in O. 83 RHC wherein pursuant to O. 83 r. 1(2) a charge is defined as a legal or an equitable charge.

Therefore, in view of the above the word "charge" that is envisaged by s. 146 of the LGA is a statutory charge or a statutory liability or burden imposed upon holdings, for rates due and owing to the local authority under the LGA

upon the failure of the owner of the holdings to pay the rates. The local authority is entitled in the last recourse to seek an order from the registrar of the High Court for the attachment and sale of the holdings in order to recover any unpaid rate or arrears of rates.

The words "charge on the holdings" can also be interpreted to mean an equitable charge over the holdings but certainly not a registered voluntary charge or legal charge of the holdings as envisaged under the NLC.

In my view by using the words "first charge over the holdings" in s. 146 of the LGA it is the intention of Parliament to confer upon the local authority, the plaintiff in the instant appeal, priority over all debts owing to persons who have proprietary interests in the holdings upon a sale of the holdings to give effect to the first charge of an amount equivalent to the outstanding amount of rates and arrears of rates due and owing to the plaintiff by the owner of the holdings, the defendant in the instant appeal, together with interest thereon at 6% per annum and costs. This priority is over and above that which is provided for in s. 268 of the NLC which expressly provides for a scheme of ranking which recognizes the priority of rent payable to the State Authority or the lessor and rates payable to a local authority in respect of the application of purchase money arising on any sale of any land subject to a voluntary charge or registered charge or legal charge pursuant to chapter 3 of part 16 of the NLC.

Sub-section (1) provides that the money shall be applied as follows:

> (a) **firstly, in the payment of rent to the State Authority or the lessor** (according as the charge was a charge of land or of a lease) **and**, so far as no person other than the chargor was responsible therefor, **any other outgoings payable to the State Authority or any local authority**".
>
> b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or [Land Administrator], as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;
>
> c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;
>
> d) fourthly, in the case of charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to para. (b) of sub-s. (2) of section 242; and
>
> (e) fifthly, in the payment off of subsequent charges, if any, in the order of their priority. (Emphasis added)

Sub-section (3) provides that the residue, if any, of the purchase money shall, subject to sub-s. (3) of s. 399, be paid to the chargor, ie, the voluntary chargor, registered chargor or legal chargor.

As the plaintiff is not a registered chargee of the property and neither is the defendant a registered chargor of the property, s. 254 of the NLC which requires a registered chargee to serve on a registered chargor a notice in Form 16D to give notice to the latter to remedy a specified breach in the event there is a breach of the agreement is inapplicable. (See *Public Bank Bhd v. Noor Ehsannuddin Mohd Harun* [2000] 8 CLJ 505).

Furthermore, there is no agreement or contract between the plaintiff and defendant to pay the arrears of rates. The liability to pay the arrears of rates is a statutory liability. This point is further dealt with in the second issue. Therefore, it is not incumbent on the plaintiff to issue and serve a Form 16D notice on the defendant before applying to the court in accordance with the provisions of O. 83 of the RHC to attach and sell the property.

The plaintiff having an equitable charge by virtue of its statutory first charge or statutory prior charge pursuant to s. 146 of the LGA has a right as a chargee or any person having the right to foreclose the charge to the following reliefs:

(i) payment of the arrears of rates by the defendant in the like manner as payment of moneys secured by a registered charge (O. 83 r. 1(1)(a));

(ii) sale of the defendant's holding in the like manner as the sale of charged property (O. 83 r. 1(1)(b);

(iii) foreclosure (O. 83 r. 1(1)(c)); and

(iv) delivery to the purchaser of vacant possession of the defendant's holding (O. 83 r. 1(1)(d)).

The word "foreclosure" is commonly used not only in bills of sale but also in relation to the procedure for obtaining an order of sale of charged lands under the Land Code. In the law of real property enclosure can only be obtained by going to court and getting an order of sale; it is not a remedy exercised by the mortgagee without an order of court; so the word "foreclosure" appears to be equivalent to proceedings under the Bill of Sale Enactment 1922 to obtain from the court an order for seizure and sale of chattels. (See *Hussain v. Chanda Singh* [1935] MLJ 1262).

With respect, the defendant's contention that if the court should rule that the charge as envisaged in s. 146 of the LGA is an equitable charge then O. 83 of the RHC is inapplicable by virtue of *Phileoallied Bank (Malaysia) Berhad v Bupinder Singh Avatar Singh & Anor (supra)* is without merits because in that case the Federal Court in holding that O. 83 of the RHC is inapplicable where the transaction is a security transaction effected by a loan agreement cum assignment supported the usage by the Court of Appeal of the words "equitable mortgage" (not "equitable charge") in relation to the loan agreement cum assignment.

At p. 2100, Abdul Malek Ahmad, FCJ, in delivering the judgment of the Federal Court said as follows:

> **Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge**, as there was no deposit of document of title with the lender, as in *Arunasalam Chetty*, for when the said loan agreement was signed there was no actual and single document of title over the said land at the time of the signing of the said loan agreement.
>
> The Federal Court in *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 approved *Arunasalam Chetty* and held that an equitable charge had arisen when a sum, claimed by the plaintiffs, was paid as deposit for the purchase of some land in which the plaintiffs and the defendant (recipient of the sum) were engaged in a joint venture. (Emphasis added)

Therefore, the plaintiff has adopted the correct procedure in proceeding under O. 83 of the RHC in order to enforce its first charge over the property and recover the arrears of rates owing by the defendant.

Second issue: Whether The Defendant Is Liable To Pay The Arrears Of The Rates As Claimed By The Plaintiff?

I am satisfied that the defendant's contention that it is not liable to pay the arrears of rates on the ground that it did not receive the half-yearly bills for assessment for the period between 1993 and 1999 is untenable, misconceived and without merits.

This is because the defendant did not raise this issue specifically in its first affidavit-in-reply as the defendant did not deny receipt of half yearly bills and the notices of assessment for the period between 1993 to 1999.

In any event the plaintiff has explained in its second affidavit-in-reply affirmed on 10 August 2001 by Suhaida bt. Kamalul Ariffin (encl. 20) that the details of the arrears of the rates due and owing by the defendant to the plaintiff should be within the knowledge of the defendant as it has been the practice of the plaintiff to send out bills in the months of January and July of each year

showing the amount of rates and arrears of rates owing by a rate payer. It is also the practice of the plaintiff to advertise in the newspapers in the months of January and July of each year informing the public that the bill for payment of assessment has been sent out by post and that anyone who had not received it should obtain the same from the plaintiff's finance department.

Furthermore, every bill sent out states clearly as follows:

> Sila berhubung dengan Majlis untuk dapatkan salinan bil jika ianya tidak diterima minggu pertama bulan Februari/Ogos.

In my judgment, the payment of assessment is a statutory responsibility of the owner of a holding under s. 133 of the LGA which provides that rates shall be payable half yearly in advance at the office of the local authority or other prescribed place in the months of January and July. Failure to pay the same by February and August results in the rates being in arrears pursuant to s. 147 LGA and the plaintiff is entitled to follow the procedure provided for in ss. 147 to 158 of the LGA to recover the arrears of rates. This is so once the plaintiff as the local authority has with the approval of the State Authority imposed the annual rate or rates within its local authority area which are payable by the defendant in respect of his holding pursuant to s. 127 of the LGA and a notice has been sent to the defendant to pay the amount so assessed for the very first time. It would appear that there is no provision in the LGA making it obligatory for the plaintiff to issue, subsequent to the first notice of assessment, bills every half-yearly although it has been the practice of the plaintiff to do so. Therefore, once a holding has been assessed for the very first time and due notice of the assessment has been given to the owner of the holding then subsequent to that, irrespective of whether or not the owner (the defendant) in the instant case, has received the half yearly bills, it is under a statutory duty to pay the arrears of rates.

The court is satisfied that the plaintiff did issue to the defendant a "Bil Separuh Tahun Kedua 1999" dated 30 June 1999 for payment of the current amount of rates and also arrears of rates amounting in the aggregate to RM1,431,535.64 requiring the defendant to pay the arrears of rates in August 1999. The defendant has contended that this bill is null and void because it is unreasonable for the arrears of rates to be aggregated in one single bill. In my view this bill is valid because there is nothing in the LGA which precludes the plaintiff from doing so.

The defendant failed to make any payment in August 1999. By a notice dated 1 September 1999 the defendant was informed that it had to pay on or before 15 October 1999 the sum of RM1,432,540.64 together with another sum of RM1,005 pursuant to s. 147 of the LGA. The defendant did not comply with

the notice. So Javed Ahmed bin Gulzar Ahmad, the plaintiff's accountant (revenue) who affirmed the affidavit-in-support (encl. (1)) of the plaintiff's originating summons (encl. (2)) issued a warrant of attachment to the plaintiff's chief bailiff in Form F dated 25 October 1999 for a sum of RM835,264.07 being the arrears and a sum of RM10,259.00 being the fine for the warrant of attachment pursuant to s. 148 of the LGA directing him to attach the defendant's movable property wherever situate within the plaintiffs local authority area.

On 27 March 2000, the plaintiff's bailiff, Tan Tek Seng, went to the property to execute the warrant of attachment but found the value of the movable property to be less than the amount of arrears. He thereupon posted a Form H notice dated 27 March 2000 at a conspicuous place on the property. However, due to a mistake in the notice, Tan Tek Seng went to the property again on 29 March 2000 to post another Form H notice dated 29 March 2000 at a conspicuous place on the property. Subsequent to that Tan Tek Seng made a statutory declaration that he had posted the two notices on the property.

The defendant again failed to make payment of the arrears to the plaintiff. So the plaintiff instructed its solicitors, Messrs. Presgrave & Matthews, to send a notice of demand dated 22 November 1999 by A.R registered post to the plaintiff claiming a sum of RM773,708.97 being the arrears from 10 April 1993 to 31 May 1999. The notice of demand has been duly served on the defendant as evidenced by the A.R. card exhibited as "JA-5".

The plaintiff has given a detailed breakdown of the sum of RM835,264.07 which it is claiming as at 31 December 1999 in paragraph 8 of its affidavit-in-support, which clearly shows the fines imposed for the half yearly notices and also for the warrants and the statement of account dated 24 March 2000 is exhibited as "JA-6".

Upon the defendant's failure to comply with the notice of demand the plaintiff filed the originating summons for the attachment and sale of the property pursuant to s. 148 of the LGA.

On 8 May 2000, the defendant entered its appearance by filing a memorandum of appearance (encl. (3)) vide its solicitors, M/s. Thayalan & Associates.

On 7 August 2001 the defendant filed its first affidavit-in-reply which was affirmed by one of its directors, Choo Ah Beng, on 6 August 2001 (encl. (19).

The defendant contended as follows:

1) that the bil Separuh Tahun Kedua 1999 was null and void;

2) that the bil Separuh Tahun Kedua 1999 did not state how the amount was calculated;

3) that the plaintiff did not show how the annual value of the property was assessed and how the annual rate was calculated;

4) that the plaintiffs claim is time barred pursuant to the Limitation Act 1957 or because of laches;

5) that the plaintiffs claim is contrary to s. 133 of the LGA; and

6) that the plaintiff had acted unreasonably by imposing on the defendant a lump sum assessment based on several years.

The defendant also denied as follows:

1) receiving the bil Separuh Tahun Kedua 1999;

2) receiving the warrants of attachment;

3) that the two notices were posted on the property;

4) receiving the notice of demand dated 22 November 1999; and

5) receiving the statement of account dated 24 March 2000.

In the plaintiff's second affidavit-in-reply affirmed by Suhaida bt Kamalul Ariffin on 10 August 2001 and filed on 10 August 2001 (encl. (20)) the plaintiff has stated as follows:

1) that the bil Separuh Tahun Kedua 1999 was sent to the defendant at the defendant's last known address in the Valuation List by prepaid ordinary post;

2) that the plaintiff is empowered by the State Authority pursuant to the LGA to impose the rates on a certain percentage (%) formula fixed by the plaintiff multiplied (x) by the annual value of the property in accordance with the Valuation List;

3) that the plaintiff had sent to the defendant by prepaid ordinary post the assessment notice dated 19 October 1991 informing the defendant the amount of rates payable for the period from the year 1992 to 1996 amounting to RM754,100 and another assessment notice dated 10 October 1996 for the amount of RM882,300 for the period from the year 1997 to 2001;

4) that the defendant had objected to the notice dated 19 October 1991 and the plaintiff heard the defendant's objection on 4 March 1992;

5) that the defendant did not object to the notice dated 10 October 1996;

6) that the defendant knows about the details of the arrears of rates which the defendant owes the plaintiff because twice a year, in January and July, the plaintiff sends out bills showing the amount payable by the defendant in respect of the property and informing the defendant that the details of the assessment can be obtained from the plaintiff's office;

7) that although the amount of arrears of rates as at 1 July 1999 as stated in the bil Separuh Tahun Kedua 1999 is RM1,431,535.64 the defendant had paid a sum of RM579,641.27 on 29 February 2000 pursuant to the decision of the Court of Appeal in Civil Appeal No: P-02-691-1995 being the arrears of rates for the period from 1 January 1987 to 9 April 1993;

8) that the amount of arrears of rates claimed by the plaintiff in this proceeding namely, RM835,264.07 is derived after deducting the sum of RM579,641.27 and annual rate for the year 1986 from the sum of RM1,431,535.64;

9) that the defendant is statutorily liable to pay the annual rate and the arrears of rates;

10) that the notice of demand sent by A.R registered post was duly received by the defendant as shown by the acknowledgment of receipt in the A.R. card;

11) that pursuant to ss. 122 and 157 of the LGA the plaintiff's records are *prima facie* evidence of the amount of rates payable by the defendant and the burden is on the defendant to show that the amount of arrears of rates claimed is incorrect;

(12) that the plaintiff's claim is not time barred as the defendant had acknowledged the plaintiff's claim by making part payment of the sum of RM579,641.27 on 29 February 2000;

13) that pursuant to s. 133 of the LGA rates are payable annually in January and June by the defendant and if not paid, the defendant is deemed to be in arrears pursuant to s. 147 of the LGA; and

14) that the rest of the defendant's statements in its affidavit-in-reply are bare denials.

The defendant filed a second affidavit-in-reply (encl. (2(A)) ("the defendant's second affidavit-in-reply") denying the plaintiff's assertions and alleging, *inter alia*, that pursuant to the decision of the Court of Appeal in *Tropiland Sdn. Bhd. v Majlis Perbandaran Pulau Pinang* [1998] 4 CLJ 299, the bil Separuh Tahun Kedua 1999 is null and void and, consequently, the warrant of attachment dated 25 October 1999 is also null and void.

However, upon the plaintiff's objections the court disregarded the defendant's second affidavit-in-reply because it was filed out of time instead of on or before 8 October 2001 as expressly directed by the SAR on 24 September 2001 and, more importantly, the defendant did not give any reason whatsoever for the delay in filing the affidavit-in-reply.

In respect of the defendant's plea of ignorance concerning its statutory duty to pay rates including arrears of rates, I agree with Miss Karin Lim's submission that it ought to be rejected because in a previous proceeding involving the same parties in this appeal the plaintiff had also instituted court proceedings to obtain an order that the same property be attached and sold under s. 151 of the LGA to satisfy arrears of rates and interest. (See *Tropiland Sdn. Bhd. v. Majlis Perbandaran Pulau Pinang* [1998] 4 CLJ 299).

In that appeal, the plaintiff had served a notice dated 1 June 1990 on the defendant to amend the 1982 and 1987 valuation lists to incorporate the car park and to assess it from 2nd April 1986. The assessment made by the plaintiff in 1990 covered two valuation lists, the first commencing from 1 January 1982 to 31 December 1986 and the second commencing from 1 January 1987 to 31 December 1991. The defendant objected to the purported amendment. The Court of Appeal ruled that there can be no amendment to an expired valuation list so as to operate retrospectively.

The Court of Appeal, consequently, held that the plaintiff could not amend the 1982 valuation list to include the defendant's car park because it had expired. The Court of Appeal only allowed the plaintiff to include the defendant's car park in the 1987 valuation list. In the instant appeal, as the defendant's car park was already included in the 1992 valuation list before it expired the issue of retrospective amendment of the 1992 valuation list does not arise and the plaintiff is entitled to claim all arrears of rates from the defendant arising from the 1992 valuation list. The notice of the 1992 valuation list has been sent to the defendant. Therefore, pursuant to s. 147 of the LGA all rates not paid shall be deemed to be in arrears and recoverable under s. 148 of the LGA.

In the instant appeal the plaintiff's claim includes a claim for rates owing since 1 January 1992 to 31 December 1996. The plaintiff relied on the 1992 valuation list. The plaintiff issued to the defendant a notice dated 19 October 1991 to

inform the defendant of the rates imposed. The defendant opposed the notice *vide* its letter dated 15 November 1991 resulting in the rates being reduced from 13.5% to 13% *vide* the plaintiffs notice dated 14 December 1992. The defendant has not specifically disputed this in its first affidavit-in-reply.

The defendant has also admitted that it had made payment pursuant to the order of the Court of Appeal dated 5 August 1998 wherein it was held liable to pay rates until 9 April 1993, part of which is based on the 1992 valuation list. The defendant had made payment for the period from 1 January 1992 to 9 April 1993 based on the 1992 valuation list. It cannot now challenge the 1992 valuation list. For rates owing since 1 January 1997, the plaintiff relied on the 1997 valuation list. The plaintiff has complied with s. 141(1) and (3) of the LGA concerning the giving of notice in respect of both the 1992 and 1997 valuation lists as evidenced by the two gazettes dated 10 October 1991 and 10 October 1996, respectively. The notice dated 10 October 1996 was issued to the defendant by the plaintiff informing it of the rates imposed. The defendant has not made any challenge nor objection to the notice dated 10th October 1996 in its first affidavit-in-reply and must, therefore be taken to have waived its rights to challenge the 1997 valuation list. The notice was sent to the defendant by prepaid ordinary post as provided for in s. 108(2)(c) of the LGA wherein service of a document on any person shall be effected, *inter alia*, "by forwarding the same by post in a prepaid letter addressed to such a person at his usual or last known place of residence or business".

Third issue: Whether The Plaintiff's Claim Is Barred By Limitation

The amount of RM835,264.07 which is claimed by the plaintiff in the originating summons is for arrears of rates from 10 April 1993 until 31 December 1999 and the action was filed on 10 April 2000. As the defendant had made payment on 29 February 2000 of the sum of RM579,641.27 there is a part payment by the defendant of the plaintiff's claim for arrears of rates which includes the claim for part of 1993. Pursuant to s. 26 of the Limitation Act 1953 time will only commence to run from 29 February 2000 and therefore the plaintiff's claim is not barred by limitation.

In the premises, I dismissed the defendant's appeal with costs.